Supreme Court, U.S.
FILED
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No. 91-1435

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MARC RICH,

Petitioner,

vs.

ACTION S.A. and DELTAMAR ESTABLISHMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Respondents avoid most of the arguments which the Petition advances. Rather, through a series of misstatements of the law and the record facts, they seek to divert the Court's attention from the untenable reasoning of the court of appeals. Petitioner responds briefly to correct those misstatements.

Respondents wrongly argue that this is a "fact-intensive" case presenting no issue worthy of review. (Opp. Br. 3).* In truth, the case presents purely legal questions of broad applicability. The decision below conflicts with this Court's decision in *Vance v. Terrazas*, 444 U.S. 252 (1980) ("*Terrazas*") that Congress intended former 8 U.S.C. §1481(c) only to prescribe the burden borne by the Government in expatriation proceedings. The ruling conflicts equally sharply with the rulings of the Seventh Circuit in *Terrazas v. Haig*, 653 F.2d 285 (7th Cir. 1981) and the Ninth Circuit in *Richards v. Secretary of State*, 752 F.2d 1413 (9th Cir. 1985) that an oath of renunciation, given at the time of an expatriating act, establishes the "intent to expatriate" requirement of *Terrazas*. These conflicts present compelling reasons for review by this Court.

The Court has Already Definitively Construed 8 U.S.C. §1481(c)

Respondents claim that the Court should not review the Second Circuit's application of §1481(c) to diversity disputes. They argue that the ruling below was justified under the "plain language" doctrine of statutory interpretation. (Opp. Br. 7). Respondents entirely miss the point. The purpose of this Court's statutory interpretation is

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* References to "Pet." are to the Petition for a Writ of Certiorari. References to "Opp. Br." are to Respondents' Brief in Opposition. References to "A. __" are to the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

"to ascertain the congressional intent and give effect to the legislative will" behind a statute. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). The plain language doctrine comes into play only where this Court has never before interpreted Congress's intent in enacting a particular federal statute. But the Court authoritatively determined the congressional intent behind §1481(c) in *Terrazas*, more than a decade ago. It found Congress's "evident aim" in enacting §1481(c) to be alteration of the holding in *Nishikawa v. Dulles*, 356 U.S. 129 (1958), that in expatriation proceedings the Government bears the burden of proof by clear and convincing evidence. 444 U.S. at 264 n.8.

The Second Circuit ignored *Terrazas*' clear holding that §1481(c) was intended to affect only expatriation proceedings. It extended the statute's scope to a field Congress did not intend to reach: diversity jurisdiction. Thus, the guiding jurisprudential principle here is not "plain language" but the obligation of lower federal courts to follow this Court's precedential interpretation of a federal statute. *See, e.g., Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983).*

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* Respondents also misstate the Court's approach to statutory interpretation. Less than a month ago, the Court held that when it is unlikely that Congress intended a statute to be applied literally, because doing so would upset a long-established judicial principle, "the key to the better interpretation" lies in reviewing the statute's legislative history. *Holmes v. Securities Investor Protection Corp.*, 60 U.S.L.W. 4225, 4227-8 (U.S. Mar. 24, 1992). In *Terrazas* itself, the Court's interpretation of §1481(c) rested on the clear statement of congressional intent contained in the House Report.

As the Court recently explained in *Ardestani v. I.N.S.*, 112 S. Ct. 515, 520 (1991), interpretation of a statute from "plain language" is rejected "when a contrary legislative intent is clearly expressed," as it is in this case. Even in cases where the statutory language has been allegedly clear, this Court has consulted legislative histories on numerous occasions to confirm whether Congress in fact accurately reflected its intent in its words. Most recently, *see, e.g., King v. St. Vincent's Hospital*, 112 S. Ct. 570, 575 n.14

(continued...)

Congress said nothing in the House Report in any way suggesting that §1481(c) was intended to affect the settled rule of *Murarka v. Bachrack Bros, Inc.*, 215 F.2d 547 (2d Cir. 1954), under which an individual is deemed a citizen of a foreign state for diversity purposes if so regarded by that state. This failure to speak is most significant, for this Court presumes that Congress does not intend a new statute to change a long-standing rule of law if "the reports and debates leading up to the [statute in question] contain not a word of this concept. This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979). *See also Dewsnup v. Timm*, 112 S. Ct. 773, 777 (1992) (where nothing in legislative history indicated Congress intended a change in prior law, no such intention inferred); *American Hospital Ass'n v. N.L.R.B.*, 111 S. Ct. 1539, 1544 (1991) (same). Respondents argue to the contrary (Opp. Br. 7-8), but, not surprisingly, cite no authorities in support.

There should be no deviation from "the well-settled principles of *stare decisis* applicable to this Court's construction of federal statutes," *Runyon v. McCrary*, 427 U.S. 160, 175 (1976); *accord, Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation...."). *See also Hilton v. South Carolina Public Railways Com'n*, 112 S.Ct. 560, 563-64 (1991). The Court should thus review the decision below, which ignored both *Terrazas*' controlling interpretation of §1481(c) and the

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*(...continued)
(1991); *Freytag v. C.I.R.*, 111 S. Ct. 2631, 2636 (1991); *Tiobb v. Radloff*, 111 S. Ct. 2197, 2200 (1991); *Astoria Federal Savings and Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 2172 (1991).

principle that a statute will not be interpreted to repeal long-standing rules of decision unless Congress makes clear its intention to do so.

Terrazas and _Richards_ Are Not Distinguishable on Their Facts

The Court should also reach the purely legal question of whether the Second Circuit's opinion should stand in light of the contrary rulings by the Seventh Circuit in *Terrazas v. Haig* and the Ninth Circuit in *Richards*. Respondents contend that *Terrazas v. Haig* and *Richards* are factually distinguishable in that the individuals there did not invoke a claim to United States citizenship after their expatriating acts. (Opp. Br. 9-10). In fact, after Terrazas swore an oath renouncing U.S. citizenship, he made two statements that he did not intend to relinquish his rights as an American citizen in taking Mexican nationality; these assertions were given no weight in view of his explicit renunciation of U.S. citizenship at the time of taking Mexican nationality. *See Terrazas v. Vance*, 577 F.2d 7, 9 (7th Cir. 1978); *Terrazas, supra*, 444 U.S. at 256 ("[P]roceedings were instituted to determine whether appellee had lost his citizenship by obtaining the certificate of Mexican nationality. Appellee denied that he had...."). The Ninth Circuit also found that Richards' oath of renunciation of U.S. citizenship when he became a Canadian citizen trumped his *post hoc* assertions that he did not have the required specific intent. 752 F.2d at 1420-22.

Richards and *Terrazas v. Haig* undercut respondents' attempted fact distinction in another manner. They emphasize that the relevant statements of renunciatory intent are those made by the party *at the time* of his expatriating acts. *Richards*, 752 F.2d 1413, 1420 n.5; *Terrazas v. Haig, supra*, 653 F.2d at 288 ("[C]ircumstantial evidence

surrounding the commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship"). *See also Kahane v. Schultz*, 653 F. Supp. 1486, 1493 (E.D.N.Y. 1987) (relevant evidence of intent is "the conduct closest in time to the act"). In contrast -- and further showing a true conflict between circuits -- the Second Circuit ignored Mr. Rich's unambiguous sworn declaration, contemporaneous with his Spanish naturalization, that he was renouncing his "USA nationality" (Pet. 76a), and credited only evidence allegedly arising from nine months to more than two years after his naturalization.*

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* Respondents' brief grossly mischaracterizes much of the "evidence" of petitioner's intent in the record. There was no finding or evidence that Mr. Rich took Spanish citizenship in 1982 to facilitiate flight from an anticipated indictment. *Cf.* Opp. Br. 6. The district court flatly refused to draw such an inference from the facts when respondents' counsel requested it. (A. 1489-90). The argument is, moreover, irrelevant: "an alleged expatriate's 'specific intent' to renounce his citizenship does not turn on his motivation." *Richards, supra*, 752 F.2d at 1422.

Respondents' claim that "Rich held himself out to the business community in Switzerland by listing himself as such in the Commercial Register of Zug" (Opp. Br. 6) conflicts with the district court's conclusion that Mr. Rich himself had no role in entering or updating entries in the Register and that the Register was therefore not significant evidence on the question of his intent to expatriate. (Pet. 23a).

The assertion that Rich claimed to be a United States citizen in Swiss litigation in May 1983 (Opp. Br. 6-7) -- while having no bearing on his intent in August 1982, the important date -- again distorts the record. Mr. Rich's Swiss lawyer gave sworn evidence that *he* drafted the statement in reliance on the entry in the Zug Commercial Register, and did not review the representation with Mr. Rich before filing the complaint. (A. 1188). Respondents never contradicted this evidence.

Finally, respondents' assertion that Mr. Rich "claimed U.S. citizenship" by alleged use of a U.S. passport (Opp. Br. 6-7) is simply wrong. At the relevant time, issuance of a passport by the Department of State was not evidence that the bearer was a citizen of the United States, *Edsell v. Mark*, 179 F. 292, 293 (9th Cir. 1910). By the same token, travelling on a U.S. passport was not then equivalent to a "claim" of U.S. citizenship.

The Court Should Review the "Dual Citizenship" Question

Respondents do not address the remaining legal question -- how is a dual citizen to be treated in diversity disputes -- except to argue that this Court should not decide it because it was allegedly not raised below by petitioner. (Opp. Br. 8-9). But that question was unequivocally reached and decided by the court of appeals. (Pet. 5a-6a). Thus, regardless of whether petitioner advanced the argument below, that question is properly before this Court for review. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 n.11 (1989); *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Federal Power Commission v. Sunray DX Oil Co.*, 391 U.S. 9, 49 n.45 (1968); *Raley v. Ohio*, 360 U.S. 423, 436 (1959).

Assuming *arguendo* that the court of appeals had never ruled on this issue, it would still be properly raised on this appeal due to the fundamental importance of federal subject matter jurisdiction. As this Court has held, "[w]hether diversity of citizenship exists may be questioned in direct review for the first time in this Court." *Glidden Company v. Zdanok*, 370 U.S. 530, 537 (1962). *See also Gainesville v. Brown-Crummer Investment Co.*, 277 U.S. 54, 59 (1928); *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884). In fact, questions concerning the lack of subject matter jurisdiction are so important that they may be raised by the Court itself even if none of the parties below has previously raised the issue. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399 (1979).

Conclusion

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the judgment of the court of appeals.

Respectfully submitted,

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